Supreme Court, U.S.
FILED
MAR 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1276

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

CITY OF WILMINGTON,

Petitioner

v.

WILMINGTON STEVEDORES, INC.,

Respondent

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Jeffrey S. Goddess
Saul, Ewing, Remick & Saul
P.O. Box 1266
Wilmington, Delaware 19899
(302) 654-1413
Counsel for Petitioner

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

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The petitioner, the City of Wilmington, Delaware, wishes to further support its petition for a writ of certiorari by filing this reply brief to address the arguments raised in the brief of the respondent.

I. THE CONTRIBUTION RULING.

In opposing certiorari, respondent Wilmington Stevedores seeks to minimize and localize the significance of the conclusions reached below. In the process, respondent tells this Court that language in the Delaware workers' compensation statute was at "the heart" of the Third Circuit opinions, and that the state statutory language dictated the result below. That is incorrect.

The central conclusion of the Third Circuit was that the maritime wrongful death cause of action, announced in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), was preemptive of any exclusivity provision in a state workers' compensation statute. The Third Circuit declared itself convinced that there was no theory or rationale "by which we could conclude that a state statute can extinguish a federally created cause of action." (Opinion sur denial, A-17.)

Having given preemptive and overriding effect to the cause of action it found in *Moragne*, the Third Circuit then could observe that Delaware law was consistent, in the sense of recognizing a preemptive sphere for liability under federal "laws". However, there is nothing in the central holding to suggest that the Third Circuit would have concluded otherwise even if the Delaware statute had been worded differently. In the view of the Third Circuit, regardless of the wording of a state's compensation statute, it must yield to *Moragne*, even in precisely the same situation where the federal maritime compensation statute would not. Cf., *Moragne*, 398 U.S. at 394, fn. 11.

As demonstrated in the City's petition, there is a fundamental and uncontrovertible split between four Circuits.[1] Two Circuits reason by practical analogy, while now two employ a literal approach and come to a contrary conclusion. One can only attempt to justify the split and harmonize the decisions by, in turn, misapprehending the significance of a *Moragne* wrongful death cause of action.

It was facile for respondent Stevedores to have brushed off that split on the basis that the respective decisions "are similarly and equally distinguishable". (Resp. brf.-3.) The varying results among the Circuits are not explainable by differences in wording of state compensation statutes. In fact, the wording of the coverage provisions in the respective state statutes did not come into play in any of those decisions. The local law neither framed the issue below, nor framed the issue in those other decisions. Hence, unless resolved here, there remains a broad split on an issue of national importance in maritime law.

II. THE INDEMNIFICATION RULING

Respondent Stevedores treats the second issue even more casually and briefly. It simply says to this Court that the City's petition constitutes the first questioning of the District Court's indemnification ruling, and that the issue was neither raised nor resolved on appeal. That is deceptive and basically incorrect.

As the prevailing party in the trial court, of course the City had not been the appellant and, hence, was not in a position to dictate the appeal issues. However, once the matter was before the Third Circuit, the City raised

1. *Thibodaux v. Atlantic Richfield Company*, 580 F.2d 841 (5th Cir. 1978), *cert. den.* 422 U.S. 909 (1979); *Murphy v. Woods Hole, Martha's Vineyard and Nantucket Steamship Authority*, 545 F.2d 235 (1st Cir. 1976); *Arvidson v. Dillingham Corporation*, 462 F.2d 1 (9th Cir. 1972), *cert. den.* 409 U.S. 983 (1972) and *Pastore v. Taiyo Gyogyo, K.K.*, 571 F.2d 777 (3d Cir. 1978).

the indemnification ruling, critically, in an attempt to utilize the issue as an alternative ground for affirmance.[2] The City gave two pages of discussion to the indemnification issue in its brief to the Court of Appeals. That discussion plainly noted the split between Fifth and Ninth Circuit precedent, and reminded the Third Circuit of its own, earlier expressed criticism of *Sieracki-Ryan*.

The Third Circuit did not take up the City's invitation to discuss the issue. However, neither did the Third Circuit sidestep the issue entirely, as it might have done by affirming on the facts but expressly reserving on the legal issue. Instead of reserving on the legal issue, it stated its conclusion, which was that *Sieracki-Ryan* would remain in good law for maritime employees not covered by the LHWCA.[3] By so doing, it thereby heightened the conflict between the maritime Circuits.

The City of course must concede that the indemnification issue, as a matter of law, was not a central point nor thoroughly treated by the Court of Appeals. However, there surely is enough here, in terms of the record developed and the significance of the issue, to decline application of the ordinary rule against considering questions not specifically passed upon by the lower court. For one, again, there is a reasonable basis to say that the Court of Appeals did specifically pass upon the issue. Further, the issue certainly was treated in the District Court, so there is a record on it. Further, it is an issue of law, with no factual issues necessary for its resolution. Hence, briefing, argument and consideration here will not be circumscribed or constrained simply because the Third Circuit has not fully explicated its views. Cf., *Capital Cities Cable, Inc. v. Crisp*, 461 U.S. 691, 697-98 (1984); *New York City Transit Authority v. Beazer*, 440 U.S. 581, 583 (1979), at fn. 24.

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2. This was in keeping with Third Circuit practice. *Rhoads v. Ford Motor Company*, 514 F.2d 931, 934 (3d Cir. 1975).

3. Slip op. at 6, fn. 1 (A-6).

The Court has oft-reiterated that its usual rule on scope of review is not inflexible. Indeed, in appropriate cases arising from federal courts this Court has directed consideration of additional issues which had not even been raised nor treated by the parties below. In the context of this case, it seems particularly appropriate to note that in fact the central issue in *Moragne* was first raised by this Court upon its own "fresh consideration of the entire subject." *Moragne*, 398 U.S. at 378.

Here the reach would not be as great. The issue presented is in the record and has been part of the case since the earliest pleadings. The issue of whether *Sieracki-Ryan* remain good law, despite obvious Congressional intent to the contrary, is an issue which, in the last analysis, only this Court can, and should resolve.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Third Circuit Court of Appeals. Nothing presented in the respondent's opposition calls into question the appropriateness of further review.

Respectfully submitted,

Jeffrey S. Goddess
SAUL, EWING, REMICK & SAUL
P. O. Box 1266
Wilmington, Delaware 19899
(302) 654-1413
Counsel for Petitioner